No. 16,390

IN THE

United States
Court of Appeals
For the Ninth Circuit

WICKAHONEY SHEEP COMPANY, An Idaho Corporation,

Appellant,

and

BANK OF IDAHO (formerly Continental State Bank), an Idaho corporation,

Appellant,

vs.

C. A. SEWELL, ORENE H. SEWELL, and ORVILLE R. WILSON,

Appellees.

Appeals from the United States District Court for the District of Idaho. Southern Division

BRIEF FOR APPELLEES

LANGROISE & SULLIVAN
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Attorneys for Appellees.

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I

INTRODUCTION

This is an action in claim and delivery brought by the appellees against appellant Wickahoney Sheep Company to recover back personal property sold under a conditional sales contract which was in default, or for the fair and reasonable market value thereof. Further, appellees sought the return of all documents escrowed under the Purchase Agreement, and the removal of a cloud on their title to the personal property.

By a supplemental complaint in this action appellees sought to recover from appellant Bank of Idaho monies paid to it which were derived from the sale of appellees' property.

Appellants' brief contains an adequate resume of the pleadings and proceedings in this action.

It is conceded that the action is between citizens of different states and that the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00; thus original jurisdiction existed in the District Court of the United States for the District of Idaho on the grounds of diversity of citizenship under Title 28 USC 1332. Jurisdiction of this United States Court of Appeals to hear and determine the appeal is based upon 28 USC Sections 1291, 1294, 2107 and Rule 73 Federal Rules of Civil Procedure.

II

STATEMENT OF THE CASE

Appellees C. A. Sewell and Orene H. Sewell, as sellers, entered into a Purchase Agreement with appellant Wickahoney Sheep Company as purchaser on December 15, 1955, for the sale of certain personal property described in the agreement, which included 4,005 ewes, 82 bucks and other personal property. (Exhibit 18.) (R. 10-15.) The total purchase price to be paid by purchasers to sellers was $121,700.00, payable $15,000.00 down at the time of execution of the Purchase Agreement, and $15,000.00 on October 10 every year thereafter, commencing on October 10, 1956, until paid in full. The unpaid balance of the

purchase price bore interest at the rate of five per cent per annum.

All of the personal property sold under the Purchase Agreement had been delivered to appellant Wickahoney Sheep Company on October 18, 1955, approximately two months prior to the execution of the agreement, and had been in the possession of appellant Wickahoney Sheep Company from the date of delivery. (R. 155, 167) In addition the President of Wickahoney Sheep Company testified that he had examined all of the property, including the sheep, prior to taking delivery. (R. 209, 210, 235)

The Purchase Agreement, Bills of Sale, and other documents were deposited with appellant Bank of Idaho at Boise, Idaho, as escrow holder, to be delivered to appellant Wickahoney Sheep Company only upon payment of the full purchase price with interest. In case of default and forfeiture the documents were to be returned to appellees. (Exhibit 19) (R. 27-32)

Thereafter the Sewells assigned this Purchase Agreement to appellee Orville R. Wilson (Exhibit 15). (R. 166)

It is uncontroverted that appellant Wickahoney Sheep Company made no payment to appellees after the original payment of $15,000.00 on the execution of the agreement. Payment of $15,000.00 due on October 10, 1956, or any part thereof, was never paid to appellees. (R. 150, 167) Likewise appellant Wickahoney Sheep Company permitted the band of sheep to become depleted and failed to maintain it

as required by the Purchase Agreement. (R. 159, 188)

The Purchase Agreement provided that in the event of default appellees should give written notice thereof by mailing it to appellant Wickahoney Sheep Company by certified mail, postage prepaid, return receipt requested. The agreement further provided that appellant Wickahoney Sheep Company should have ninety days after such written notice in which to remedy any defaults. Pursuant to these provisions of the agreement appellees mailed a notice of default (Exhibit 6) (R. 151) which was received by appellant Wickahoney Sheep Company on January 17, 1957 (Exhibit 8) and likewise a copy of said default notice was mailed to appellant Bank of Idaho and received by it on January 16, 1957 (Exhibit 7). Appellants do not deny nor controvert that this default notice was received by them. Nor do they in any way assert that the notice of default was not entirely adequate.

Appellant Wickahoney Sheep Company wholly failed, during said ninety day period, to make the $15,000.00 payment due October 10, 1956, or any part thereof; nor has such payment ever been made. (R. 158) Likewise appellant Wickahoney Sheep Company failed to restore the band of sheep to its original number as required by the Purchase Agreement (R. 159) After the expiration of the ninety day period appellees declared a forfeiture of the Purchase Agreement and demanded possession of all of their personal property being sold under the Pur-

chase Agreement. Likewise appellees made demand upon appellant Bank of Idaho, as escrow holder, to turn over and deliver to them all documents held by it in escrow. (Exhibit 10) (R. 157, 184) This demand was refused.

Appellant Wickahoney Sheep Company refused to turn over to appellees said personal property or any part thereof. (R. 159, 167, 185) Not only did appellant Wickahoney Sheep Company in fact receive a proper notice of default, but its President testified that as early as July of 1956 he had received instructions to sell the sheep belonging to appellees, and that he knew at that time that there was no intention to make the payment due on October 10, 1956. (R. 237-239)

After the forfeiture of the Purchase Agreement and after the commencement of this action appellant Wickahoney Sheep Company sold lambs and sheep belonging to appellees, during the months of July and August of 1957, for the total sale price of $86,-082.50, without the consent of appellees. (Exhibit 13) (R. 80, 163, 164) Appellant Wickahoney Sheep Company had from time to time borrowed monies from appellant Bank of Idaho and as of January 5, 1957, the indebtedness was in the principal sum of $100,000.00. (R. 74-75) The $86,082.50 received by appellant Wickahoney Sheep Company from the sale of appellees' sheep and lambs was turned over by it to appellant Bank of Idaho to apply on the indebtedness. It is not controverted by appellants that the Bank of Idaho had full knowledge that these funds

were derived from the proceeds received from the sale of appellees' sheep and lambs. (Exhibit 14) (R. 76, 165)

It should be pointed out that after the notice of default was given appellant Wickahoney Sheep Company also sold wool and pelts derived from appellees' sheep and received wool and lamb subsidies. However, the trial court permitted the appellants to keep and retain all of these funds.

On October 9, 1957, on motion of appellant Wickahoney Sheep Company, the court appointed a receiver in this action who took possession of all of the assets of appellant Wickahoney Sheep Company. (R. 188, 190) This included all of the property being sold under the Purchase Agreement then remaining including 44 bucks, 100 small lambs and 3,187 ewes belonging to appellees (Exhibit 12). (R. 63-66, 160, 191) It thus appears that the band of sheep was short 818 ewes; however, the trial court did not award judgment to appellees for this shortage.

The receiver proceeded immediately to liquidate the personal property and the sale price which he received from the sale of appellees' property was $62,370.18. (R. 104-108, 191)

The evidence shows that the fair and reasonable market value of appellees' property was the amount received from the sale thereof by appellant Wickahoney Sheep Company and the receiver. (R. 168-170, 191-192) Also that the value of a one and one-half ton 1954 International truck which was not delivered to the receiver was $1,000.00. (R. 170-171)

During the course of this action appellant Bank of Idaho turned over to the Clerk of the Court all the escrow documents, and likewise the chattel mortgages on appellees' sheep (Exhibits 3, 4, 5, 21) and satisfactions thereof which had been given by appellant Wickahoney Sheep Company to appellant Bank of Idaho to secure its loans. (R. 52-54)

In the third defense and counterclaim appellants alleged fraud on the part of appellees Sewell. However, it appears from their brief that appellants have abandoned this defense, and properly so, as not one bit of evidence of fraud or misrepresentations was ever introduced.

The trial court made and entered its findings of fact and conclusions of law (R. 117-131). Thereupon judgment was entered in favor of appellees against appellant Wickahoney Sheep Company in the sum of $149,452.68, being the fair and reasonable market value of appellees' property being sold under the Purchase Agreement, which this appellant had failed and refused to turn over and deliver to appellees. Likewise judgment was entered against appellant Bank of Idaho in the sum of $86,082.50, being the amount of the monies received by it from appellant Wickahoney Sheep Company derived from the sale of appellees' sheep and lambs. The judgment further ordered the Clerk of the Court to pay to appellees the sum of $54,655.04, being the balance turned over to the Clerk by the receiver after deduction of all receivership costs and expenses, same to be applied in satisfaction of the judgment against appellant

Wickahoney Sheep Company. Further the Clerk was ordered to deliver to the appellees the escrow documents and the chattel mortgages and the satisfaction thereof. (R. 131-133)

III

SUMMARY OF ARGUMENT

(A) The giving by appellees of the notice of default to appellants in the manner prescribed by the purchase agreement is sufficient to effect a forfeiture of the purchase agreement.

(B) The evidence establishes the valuation of appellees' property as awarded by the judgment of the trial court.

(C) Appellants had duly performed all of the conditions precedent of said purchase agreement required by them.

(D) Appellees are clearly entitled to the full amount of the judgment awarded them by the trial court.

IV

ARGUMENT

(A.) THE GIVING BY APPELLEES OF THE NOTICE OF DEFAULT TO APPELLANTS IN THE MANNER PRESCRIBED BY THE PURCHASE AGREEMENT IS SUFFICIENT TO EFFECT A FORFEITURE OF THE PURCHASE AGREEMENT.

The Purchase Agreement dated December 15, 1955, between appellees Charles A. Sewell and Orene H. Sewell as sellers and appellant Wickahoney Sheep Company as purchaser (Exhibit 18) which is the subject matter of this controversy, contains the following provisions:

> "Time is of the essence of this agreement, and should Purchaser be in default in any of the terms or conditions of this agreement, Sellers shall give Purchaser notice of such claimed default in writing, addressed to Purchaser at 212 Continental Bank Building, Boise, Idaho, to be sent by registered or certified mail, postage prepaid, return receipt requested, and thereafter Purchaser shall have ninety (90) days within which to remedy the claimed default. Should the Purchaser fully perform those matters claimed to be in default as set out in said notice within said ninety-day period, no forfeiture may be declared or shall become effective. However, in the event that Purchaser fails to remedy the claimed default within the ninety-day period, Seller may claim a forfeiture of this agreement and shall have the right to retake possession of the personal property herein described, or its replacements, and the Sellers may retain all payments made hereunder as liquidated damages."

Pursuant to these provisions appellees gave appellants written notice of default which was admittedly received by appellant Wickahoney Sheep Company

on January 17, 1957, and by appellant Bank of Idaho on January 16, 1957. There is no contention made by appellants that the notice of default was in any way inadequate nor do they deny that appellant Wickahoney Sheep Company was in fact in default under the terms of the Purchase Agreement as set forth in the notice of default. The following statement is made in appellants' brief at page 22:

> "It is admitted, of course, in this case that the forfeiture provisions of the Purchase Agreement between the parties was complied with by the appellees."

The escrow agreement did provide that any notice of default should be furnished to the escrow holder and by it mailed to appellant Wickahoney Sheep Company, and further provided for a thirty day period in which to remedy the default.

The principal defense of appellants in this action is that no forfeiture of the Purchase Agreement was accomplished because the notice of default was given by the sellers directly to the purchaser, appellant Wickahoney Sheep Company, and to the escrow holder, appellant Bank of Idaho, and not channeled through the escrow holder.

By appellees complying with the provisions of the Purchase Agreement appellant Wickahoney Sheep Company was given a ninety day period in which to remedy the defaults. Had appellees given a thirty day notice as provided in the escrow agreement, then of course, appellants would now be claiming that

there was no forfeiture because the ninety days' notice was not given.

The escrow agreement provides merely that the "*Escrow holder* shall not be required to recognize service of notice given in any other manner." It does not state that the parties to the Purchase Agreement shall not be bound by a notice of default given in conformity to the requirements of the Purchase Agreement.

The escrow agreement itself is ambiguous and its terminology is awkward. It contains this provision: "It is further agreed that if any part of the escrow agreement and this agreement are in conflict, then the provisions of this agreement shall govern." Only two contracts are involved, to-wit: the Purchase Agreement and the escrow agreement. The above quoted paragraph refers to the escrow agreement and also to "this agreement." The escrow agreement is clearly specified and therefore the words "this agreement" can only refer to the Purchase Agreement. Consequently under this language, in case of conflict, the Purchase Agreement shall govern.

It is the general rule that the purpose of a notice requirement in a contract is to give the purchaser an opportunity to remedy any defaults that may exist. It is unquestioned that both appellants had notice of the defaults. Appellant Wickahoney Sheep Company was given ninety days to remedy the defaults, but did absolutely nothing.

Bintz Company vs. Mueggler, 65 Idaho 760, 154 P2d 513, (1944), was an action in claim and deliv-

ery to recover a machine sold by plaintiff under a conditional sales contract. The defense was breach of warranty. The contract provided that written notice must be given of any claimed breach of warranty within thirty days. This written notice was not given but the plaintiff did have actual knowledge of the claimed breach. The Court held for the defendant saying:

> "The failure of the purchaser to give notice of defects or failure to do the work for which the machine was purchased, became unnecessary in this case, for the reason that it was admitted that the seller's agent who installed the machinery, had notice of the defects and attempted to remedy them. As said by this court in Harrison v. Russell & Co., 12 Ida. 624, 632, 87 P. 784:
>
> " "The only purpose of notice is to enable the vendor to examine the machinery and remedy any defects and put it in running order. When that purpose has been served and the company's agents have taken charge of and examined and worked on the machinery, it becomes immaterial whether any notice at all has been given." "

In J. I. Case Threshing Machine Company vs. Tate, 70 Colo. 67, 197 P 764, (1921), the action was for breach of warranty and notice was not given as required by the contract. The Court said:

> "The great weight of authority sustains the position that the purpose of notice is to enable the seller to remedy defects, if possible; and that when

experts have been sent out, and opportunity has been given them to make the necessary changes in the machine, or in its operation, the purpose of the requirement of notice has been served."

The law is well established in Idaho that where a party to a contract claims that notice was not given in strict conformance to the terms of the agreement he must plead and prove that he was prejudiced thereby. In the very recent case of Mowers vs. Holland Furnace Company, . . . Idaho . ., 339 P2d 663, (1959), the plaintiff entered into two written contracts to purchase a heating system and accessories from defendant. The contract provided that the buyer must notify seller in writing within a year for any claimed violation of the seller's guarantee. Plaintiff sued to rescind the contract. The defense was that no written notice was given as required by the contract; however, the defendant did have knowledge that a violation was claimed. The Court held for the plaintiff and stated as follows:

"This Court has held that the failure to give notice such as is here involved is a matter of affirmative defense and that failure to give notice will not relieve the party of responsibility unless such party has been prejudiced by the violation. Both the fact of the failure to give notice and that prejudice resulted therefrom, are matters of affirmative defense which must be pleaded and proved by the aggrieved party."

Quinn vs. Hartford Accident and Indemnity Com-

pany, 71 Idaho 449, 232 P2d 965, (1951) was an action to recover on a contractor's bond. The bond contained the following provision:

> "Provided, however, it shall be a condition precedent to any right of recovery hereunder that, in the event of any default on the part of the Principal, a written statement of the particular facts showing the date and nature of such default shall be immediately given by the Obligee to the Surety and be forwarded by registered mail to the Surety at its Home office in the City of Hartford, Connecticut."

The defendant had actual notice of the defaults of the contractor but no written notice was given as required by the contract. The Court held that the failure to give the written notice was not a defense where it did not appear from the evidence that the defendant was in any way prejudiced in its rights by such failure.

See also:

Leach vs. Farmers Automobile Inter-Insurance Exchange, 70 Idaho 156, 213 P2d 920 (1950).

Olson Brothers vs. Hurd, 20 Idaho 47, 116 P 358, (1911).

The answer of appellants makes no claim of any kind that either of them were in any way prejudiced because the notice of default was given directly to appellant Wickahoney Sheep Company instead of passing through the Bank. Nor is there the slightest bit of evidence in the record that any such prejudice

resulted. Indeed, appellants, in their brief make no claim whatsoever that they were prejudiced in any way or suffered any injury or even inconvenience.

Appellees submit that appellants have cited no authorities whatsoever to support their contention that there was no forfeiture of the contract because of the manner in which the notice of default was given. One group of appellants' cases are concerned with a total lack of notice of default, or where the notice itself was materially defective. In the case at bar the written notice of default was admittedly given and received and its sufficiency is unquestioned.

The other group of appellants' cases deal with actions against an escrow holder for breach of its obligations as such. This action does not in any way attempt to impose any liability on the escrow holder. Obviously from its terms, the purpose of the escrow agreement is to define the obligations of the escrow holder and to limit its liability. Appellees seek no damages whatsoever against the Bank of Idaho as escrow holder. Appellant Bank of Idaho is a party to this action under the supplemental complaint for knowingly and willfully receiving funds belonging to appellees and applying them on the indebtedness of appellant Wickahoney Sheep Company. Such actions of appellant Bank of Idaho do not involve its status as the escrow holder.

Appellees gave the notice of default in exact conformity to the requirements of the Purchase Agreement to both appellants and gave the full ninety-day period in which to remedy the admitted defaults,

which is more than adequate to accomplish a forfeiture of the Purchase Agreement.

(B.) THE EVIDENCE ESTABLISHES THE VALUATION OF APPELLEES' PROPERTY AS AWARDED BY THE JUDGMENT OF THE TRIAL COURT.

After the Purchase Agreement was forfeited because of the admitted defaults of appellant Wickahoney Sheep Company, the latter failed and refused to deliver to appellees their property. Instead it retained possession and in July and August of 1957 sold a large number of appellees' sheep and lambs for the total purchase price of $86,082.50. The evidence is uncontradicted that this purchase price was the fair and reasonable value of the sheep and lambs.

On petition of appellant Wickahoney Sheep Company a receiver was appointed by the court in this action. He took possession of all of the property then in the possession of appellant Wickahoney Sheep Company on October 9, 1957, and proceeded immediately to sell the balance of the sheep and other personal property. The receiver received the sum of $62,370.18 from the sale of the property of appellees, and the evidence is uncontradicted that this was the fair and reasonable market value of appellees' property.

It is true that the Idaho Court has stated that in an action of claim and delivery the general rule in Idaho is that the property is to be valued as of the time of the taking. However, none of the cases cited in appellants' brief were concerned with the peculiar

factual situation existing in the case at bar.

Not only did appellant Wickahoney Sheep Company wrongfully refuse to deliver appellees' property to them, but after this action was commenced and service had upon appellants, appellant Wickahoney Sheep Company proceeded to sell a large number of appellees' lambs and sheep. Where property is of a fluctuating value, and particularly where the wrongdoer sells another's property there is an exception to the general rule as to the time when the value shall be established. In 46 Am. Jur. Replevin, Section 148, the rule is stated as follows:

> "Time as of Which Value is Estimated.—The general rule in replevin is that the damages will be the value of the property at the time of taking, with interest from that time, but a number of well-reasoned cases support the rule that the value to be assessed is the value at the time of the trial. *In the case of property having a fluctuating market value, there is authority to the effect that the successful party will be allowed the highest price intermediate the taking and the trial, if the suit was commenced within a reasonable time, and prosecuted without unnecessary delay.*" (Emphasis ours.)

Again it is stated in 77 C.J.S. Replevin, Section 270, as follows:

> "Property which fluctuates in value. In some cases it has apparently been recognized that, in determining the time as of which property which

fluctuates in value should be valued for the purpose of a recovery by the prevailing party in replevin, the circumstances may call for the application of a rule other than that which might be applicable with respect to other property. The view has been expressed that the form of action is not material in determining the question, and that rules similar to rules applicable in trover in this regard apply. The general principle is that the prevailing party must be adequately compensated, and that the wrongdoer shall not profit by his wrong. So it has been held that, where it has not been shown that the prevailing party who has, under a statute, elected to take the value of the property is deprived of a higher value than he would have profited by had he retained possession and further, it is not shown that the wrongdoer profited by the higher immediate value, the prevailing party will not be entitled to the highest price available between the time of the wrongful detention and before the entry of judgment. *On the other hand, it seems that an intermediate higher value may be allowed where the enhanced price has been realized by the wrongdoer, or it is reasonable to be believed and closely probable that the owner would have realized it had he retained possession.* It has been held that this higher value in such a case should be the highest market value within a reasonable time after the property is taken, and not the highest value at any time after the taking." (Emphasis ours.)

Three States Lumber Company vs. Blanks, 133 F. 479 (CCA 6), (1904), was an action of replevin wherein the plaintiffs took possession of a quantity of lumber. Thereafter, in another action, the plaintiff caused the lumber to be sold for salvage. In the replevin action it was determined that the plaintiff had no right to the lumber and judgment was for the defendant for its value. In considering the determination of value the court said:

> "The judgment below was for the value of the lumber at the time it was taken, with interest. That much was in strict accordance with Section 5144, Shannon's Code Tenn., as construed in Mayberry v. Cliffe, 7 Cold. 117. The jury also found, upon evidence, that there had been a rise in the value, and they accordingly assessed the difference between the value when seized and the value at date of trial as damages for detention. This, too, is in accord with the construction placed on the act by the case cited above."

Plaintiff sought the delivery of a truck and trailer or its reasonable value in Miller vs. Wantland, 143 Pac. (2d) 807 (Okla.) (1943), and recovered judgment therein. The Court stated that the general rule in Oklahoma is that property shall be evaluated in a replevin action at the time of the taking. However, the Court said that where the property was sold eighteen days after it had been purchased and delivered to plaintiff, and the testimony did not show a decreased value in the meantime, that the purchase

price was sufficient evidence to justify the determination of value as of the time of the taking.

In Page vs. Fowler, 39 Cal. 412, 2 Am. Rep. 462 (1870), plaintiff took possession of a crop of hay in a replevin action commenced in 1863 and subsequently sold it. Judgment was for the defendant and in determining the value of the hay to which the defendant would be entitled the jury assessed damages at $25,763.23. At the time the property was taken it was not worth more than $2,500.00. The basis of the verdict was evidence that in 1864, a year of great scarcity, the value of hay had tremendously increased.

The Court reversed the judgment of the trial court based upon the verdict, saying that valuation based on values a year later in a very unusual situation was unreasonable. However, the Court stated that although the general rule is that damages are to be measured by the value of the property at the time it was taken, there is an exception in cases involving property of a fluctuating value. And therein the correct measure of damages is the highest market value within a reasonable time after the property was taken.

Barnard vs. Corlett, 161 Pac. 156 (Colo.) (1916), was an action of replevin for hay. The defendant gave a redelivery bond and retained possession.

Subsequently, and during the litigation the defendant fed the hay to his stock. Judgment for the plaintiff for the value of the hay at the time the defendant fed it. The Appellant Court affirmed the

judgment and stated that although the general rule in Colorado is that in a replevin action the property is evaluated as of the time of the taking, under the circumstances of this case it was proper to determine the value as of the time the defendant fed the hay to his stock.

See also Maier vs. Henson Motor Co., 151 S.W. (2d) 452 (Mo.) (1941).

Thus it appears that in the case at bar the circumstances call for the application of the exception to the general rule. Had appellant Wickahoney Sheep Company returned the property to appellees after the forfeiture was declared, as it was lawfully bound to do, then the appellees could have sold the lambs at the usual market time which commenced the first of July, 1957, and would have realized from such sale the same price as did appellant Wickahoney Sheep Company. Consequently the price received by Wickahoney is a proper determination of value and is the correct amount to be awarded appellees in the judgment against the appellants. Otherwise the appellants would be permitted to profit by their own wrongful acts. It would be highly unjust and inequitable to permit them to wrongfully retain possession, unlawfully sell the property during the course of litigation, and then claim that they are entitled to any profits they might have realized because of enhancement of value.

As to the sales made by the receiver appointed at the request of appellant Wickahoney Sheep Company, an even stronger situation prevails. When the

receiver took possession he was acting as an officer of the Court and the property was then in custodia legis. The judgment of the Court was that at that time the property was in fact owned by appellees and that they were entitled to the possession thereof. Therefore, when the receiver sold appellees' property, under order of the Court, the proceeds of such sales belong to appellees.

This rule is well explained in 77 C.J.S. Replevin Section 270, as follows:

> "Where property not available at trial. Where at the time of the trial the property has been lost or destroyed, the rule that the value is to be assessed as of the time of the trial has been regarded as inapplicable, and in such case the value is measured as of the time of the wrongful taking or detention. *Where the property has been sold before trial by order of court, it has been held that the value is to be measured as of the date of the sale.*" (Emphasis ours.)

To the same effect is Huntington vs. Jamieson, 50 S. W. (2d) 705 (Mo.) (1932). That was an action of replevin and the sheriff took possession of the property about November 9, 1929. Subsequently, on July 26, 1930, the sheriff sold the property under order of court at a public sale for $274.55. Defendant testified the property was worth $1,000.00. The verdict was for the defendant for $750.00. The Appellate court reversed saying that the general rule in Missouri is that value of property is assessed as of

date of trial; however, where the property has been disposed of under order of court the value of property must be assessed as of the time of sale. The Court also stated that the same rule would apply to property where voluntarily sold by the wrongdoer.

Thus if the property sold by the receiver under order of court was owned by appellees, it is clear that they are entitled to the full proceeds received from their sale. And it was so determined by the trial court.

(C.) APPELLEES HAD DULY PERFORMED ALL OF THE CONDITIONS PRECEDENT OF SAID PURCHASE AGREEMENT REQUIRED OF THEM.

On December 15, 1955, appellees Sewell and appellant Wickahoney Sheep Company entered into the purchase contract for the sale of sheep and other personal property, which is the subject matter of this action (Exhibit 18). This contract was complete in and of itself, and was not related to any other agreement.

On the same date appellees Sewell also entered into a lease agreement, leasing real estate to appellant Wickahoney Sheep Company (Exhibit 17).

Previously, and on October 18, 1955, appellees Sewell and appellant Wickahoney Sheep Company entered into a memorandum agreement (Exhibit 23), which referred to another contract also dated October 18, 1955, which contract has been completely superseded.

The lease agreement was shortly thereafter assigned by Wickahoney Sheep Company to the Ruby Company, a wholly separate and independent corporation, which is not a party to this action. The Wickahoney Sheep Company did not retain or reserve, and does not now have, any rights or interest whatsoever in said lease agreement.

There is no relationship whatsoever between the purchase agreement for the sale of personal property on which this suit is based, and the lease agreement or the memorandum agreement. They are not connected nor interrelated in any way. However, appellants now contend that appellees have failed to perform all of the conditions of the memorandum agreement, and for that reason are now in default under the terms of the purchase agreement.

It should be pointed out that appellants did not plead the defense of breach of contract on the part of appellees, nor was this defense ever raised during the trial. Appellants pleaded a defense of fraud and misrepresentation, and it was on that theory that the case was tried. After the trial the following colloquy occurred between the court and the attorney for appellants concerning the theory of their defense (R. 264):

> "The Court: Assuming that that is true, does that give you a basis for an action for fraud and misrepresentation, or breach of contract?
>
> Mr. Hawley: I think fraud and misrepresentation."

Thus, this defense of failure on the part of appellees to perform the requirements of the purchase agreement is raised for the first time on this appeal.

In any event, the record shows that appellees were not in default under the provisions of the memorandum agreement (Exhibit 23). The 800 A.U.M.'s were in fact transferred by Sewell to appellant Wickahoney Sheep Company, and were attached to the Coig property which was under lease. (R. 233, 234 and 260.) Likewise, appellant Wickahoney Sheep Company had the use of the Nit Creek range and property during all of the period in question (R. 236-242). Harley McDowell fixed the value of the 800 A.U.M.'s and the Nit Creek property in excess of $11,000.00. However, Wickahoney Sheep Company never paid appellees anything for the 800 A.U.M.'s nor the use of the Nit Creek property (R. 237). Lloyd Haight prepared a proposed lease agreement and option agreement (Exhibits 28 and 29), and sent them to Orville Wilson, attorney for the Sewells in the latter part of September, 1956 (R. 250). On October 5, 1956, Orville Wilson wrote to Haight, acknowledging receipt of these documents (R. 251) (Exhibit 30). In this letter Orville Wilson pointed out several defects in these instruments. He also stated to Haight that he did not think there were any insurmountable difficulties, and if they could confer on them the agreements could be worked out. However, neither Haight nor appellant Wickahoney Sheep Company ever did anything further in this matter. Consequently, there can be no assertion by

appellants that appellees were in default even under the terms of the separate and independent memorandum agreement.

The case of Huggins vs. Green Top Dairy Farms, Inc., 75 Idaho 436, 273 Pac. (2d) 399, relied upon by appellants, does not sustain their position. The court in that case found that the defendant was not in default because it had tendered complete performance during the grace period, and also that the plaintiffs were in fact in default in several material particulars under the terms of the agreement which was the basis of that suit. Therefore, no forfeiture was allowed. That case is certainly no authority for the contention that because appellees are claimed to be in default under a wholly separate and independent agreement they are not permitted to forfeit the purchase agreement, whose provisions it is admitted they have fully complied with.

Likewise, the case of Giffen vs. Faulkner, 50 Idaho 190, 294 Pac. 521, gives appellants no assistance, because there appellants were greatly in material default under the terms of the very agreement which was the subject of the action.

Appellees submit that where they have fully performed all the requirements of the purchase agreement which is the basis of this action, that it is no defense for appellants to assert that they were in default under the requirements of the wholly separate, independent and unrelated contract. And, in addition, the facts clearly show they were not in fact in default even under the terms of the separate mem-

orandum agreement.

(D.) APPELLEES ARE CLEARLY ENTITLED TO THE FULL AMOUNT OF THE JUDGMENT AWARDED THEM BY THE TRIAL COURT.

The appellants assert that they should be entitled to an offset for their reasonable expense in the care and maintenance of the sheep, and the expenses of the operation of appellant Wickahoney Sheep Company.

The obvious answer to this contention is that appellants made no claim in their answer or counterclaim for any such offset, nor is there the slightest bit of evidence as to what these expenses were, nor whether or not they were reasonable. Appellants do not even set forth in their Brief the period of time for which they think they are entitled to such an allowance. Certainly such an award cannot be made in the absence of proof, nor were appellees afforded any opportunity to counteract any possible showing of the reasonableness of such expense.

It appears from the authorities that in an action of claim and delivery to entitle the defendant to an offset for expenses in keeping the property certain essential elements must be present which are clearly absent in this case.

First, any such award must be supported by pleadings and proof, which is not done here as pointed out above. (46 Am. Jur., Replevin, Sections 142-143.) Secondly, the property must actually have a value for use, such as horses, farm implements, tools of trade, etc. Sheep have no value for use, but only

for sale or consumption, in which case the recovery must be of the goods or for value. (46 Am. Jur., Replevin, Sections 145-156.)

Thirdly, the detention of the property must have been in good faith. It is rather astonishing that these appellants should now assert that their detention of appellees' property was in good faith. Appellant Wickahoney Sheep Company had determined as early as July, 1956, that it was not going to make the payment due October 10, 1956, and that in addition to this deliberate intent to default on the contract it planned also at that time to start selling off appellees' sheep (R. 238-239). The breach of the purchase agreement by appellant Wickahoney Sheep Company was not an accidental oversight, but was intentionally planned, and in spite of that after the notice of default was given it still refused to perform throughout the ninety-day notice period, and then upon forfeiture of the purchase agreement by appellees flatly refused to return their property to them. And then after this action was instituted appellant Wickahoney Sheep Company continued to sell off appellees' sheep and lambs. In spite of all these activities appellants base their contention that they acted in good faith on the flimsy excuse that there was no forfeiture because the notice of default did not pass through the escrow holder.

The subject case is in this respect entirely different from the case of State vs. Shevlin-Carpenter Co. (1895), 64 N.W. 81 (Minn.), which is cited by appellants on page 42 of their Brief. The latter case

involved the processing and marketing of state owned timber under a permit which had actually been issued by the state but was later construed as invalid. Thus, the taking was in good faith, and the amount of the costs of the processing and sale were pleaded and proved by the defendant.

The case cited by appellants on page 43 of their Brief, Guerin vs. Kirst, 202 P. 2d 10 (Cal.) (1949), 7 A.L.R. 2d 922, involved the conditional sale of a tractor which actually had allowable value for use, the claimant was the owner, and the defendant was an innocent purchaser from the conditional vendees. Both the award of damages for use and the offset for costs of maintenance were pleaded and proved. Thus, the latter case has all the elements lacked by the subject case, that is, the property in controversy actually had value for use, the plaintiff had the right to the use, good faith of the defendant, and both the value for use as damages and the cost of the maintenance of the tractor as an offset were pleaded and proved.

The decision of the court in Cunningham vs. Stoner, 10 Idaho 549, 79 P. 228 (1904), at page 560, contains language which indicates that wool (but not lambs) might be usable value of sheep against which there might be an offset for the costs directly attributable to the usable values, that is, the cost of shearing and marketing to the date of judgment, provided the sheep were being held in good faith. But no allowance should also be made for the cost of keeping the sheep. To do so, in fact, would be to imply a con-

tract directly contrary to the will of the owner.

The appellants state in their Brief, page 41, that the judgment awarded to appellees in this action was "an unconscionable recovery." Also, they make the statement that the judgment awarded appellees the proceeds from sale of wool. In this they are clearly in error. The trial court permitted the appellants to retain all proceeds received by them from the sale of wool, pelts and lamb subsidies made after the notice of default was given, and even after the forfeiture of the agreement. This sum which appellants were permitted to keep amounted to the sum of $31,-869.80. (R. 80.)

Also, the purchase agreement provided that appellant Wickahoney Sheep Company must maintain the band of sheep, which at the time of sale consisted of 4,005 ewes. At the time the property was turned over to the receiver the band of sheep was short 818 ewes, which under the contract Wickahoney Sheep Company was required to replace. The reasonable value of replacing these missing ewes is $19,632.00 (R. 162, 194). However, the judgment did not award appellees this sum for replacements. Thus, it would appear that as far as equities are concerned the appellants were very well treated by the trial court.

Appellants contend this was merely a security transaction. Consequently, appellees should be limited in their recovery to the balance due on their contract. It is noteworthy that appellants say nothing about the interest of 5% per annum required to be

paid under the purchase agreement for a period of three and one-half years, which was never paid. However, this is an action for claim and delivery, and under the terms of the purchase agreement appellees were entitled, upon forfeiture, to recover possession of their property, or its value in case delivery cannot be had.

Idaho Code 10-1104

Largilliere Co., Bankers v. Kunz, 41 Idaho 767, 244 Pac. 404

Tannahill v. Lydon, 31 Idaho 608, 173 P. 1146

Bates v. Capital State Bank, 21 Idaho 141, 121 P. 561

Oakes v. Lake, 290 U.S. 59, 78 L. ed. 168

By the terms of the contract itself, however, no title passed until the contract was performed, and in the event of a default by the appellant Wickahoney Sheep Company the appellees had but one remedy; that is, to retake the property. There were no innocent third parties involved. There was no provision for the survival of any debt in the event the value of the property was less than the amounts due by virtue of the contract, and no provision for acceleration of the payments in the event of a default.

Once the agreement was forfeited there was no debt to be secured, and the appellant Wickahoney Sheep Company had lost any right it may have had ultimately to obligate the appellees to convey title to the sheep.

Clearly, this was nothing more than an executory contract for the sale of property, and not in any

sense a mortgage or lien either at the time the agreement was made or at the time of the filing of this action. Consequently, the principles of damages which relate to security transactions would have no application to this action without injecting into the agreement an entirely new provision which obviously the parties never intended.

Appellants cite certain cases on pages 45 and 46 of their Brief in support of the principle limiting recovery in security transactions to the amount of the indebtedness.

Each one of these cases was a true security transaction, with an indebtedness on the part of the vendee aside from and not necessarily equivalent to the value of the property which was being replevined. In Road Equipment & Material Co., Inc. vs. McGowan, 91 So. 2d 554 (Miss.) (1956), the court simply held that the plaintiff could not join an action for replevin of a dragline machine with an action for debt on the installment notes given with the conditional sales contract, and held the personal judgment on the installment notes void.

In Creighton vs. Haythorn, 68 N.W. 934, (Neb.) (1896), the claimant had no right of ownership or title in the livestock. All he had was a lien for damages incurred when the livestock trespassed on his property. This case also held that damages for the unlawful detention of property cannot be awarded without pleading and proof of the value of possession.

Hickman-Williams Agency vs. Haney, 40 N.W.

2d 813 (Neb.) (1950), involved controversies as to the disposition of the proceeds of the sale of an automobile between the holder of a chattel mortgage and negotiable note and the holder of an artisan's lien, both of whom had participated in the sale of the automobile to an innocent third person.

In Robbins vs. Welfare Finance Corporation, 96 S.E. 2d 892 (Georgia) (1957), money had been borrowed to pay off prior loans, secured by a promissory note and bill of sale for a chattel. The court held that the amount of the indebtedness did not determine the value of the chattel because there was no sale involved, and reversed the judgment of the lower court for failure of proof of value and demand and refusal prior to suit.

Frontier Motors vs. Chick Norton Buick Co., 279 P. 2d. 1032 (Ariz.) (1955), involved a conditional sales contract which provided for specific monthly payments and for the acceleration thereof and possession of the automobile in the event of default in payment. The parties to the action were the seller and an innocent third party who had paid value for the automobile, and who had no privity of contract with the seller.

In each of the cases cited above there was a true special interest securing an indebtedness aside from the value of the property, which indebtedness could be asserted in a separate action against the defendant or another party. Any judgment exceeding the value of the property would have been in the nature of a personal judgment for debt which the court

could not enter either because a replevin action could not be joined with an action for debt or because there was no privity of contract. On the other hand, in the instant action there was no indebtedness to be claimed and the appellees demanded only the return of their own property, or its value. Consequently, the value of the property was the only possible measure of recovery where the property could not be returned.

V

CONCLUSION

For their defense to this action appellants place chief reliance on the fact that the notice of default was given directly to each of the appellants instead of being transmitted through the escrow holder. In the giving of the notice appellees fully complied with the provisions of the purchase agreement, and appellants do not even attempt to assert that any prejudice resulted to them.

Appellees are clearly entitled to the full amount of the judgment awarded to them by the District Court. Upon the forfeiture of the agreement they were entitled to the possession of all their property and, therefore, they obviously are entitled to receive the proceeds of the sales of their property wrongfully made by appellant Wickahoney Sheep Company, and also the proceeds of the receiver's sales of their property made under order of Court.

Appellants admit that appellees fully performed all the provisions of the purchase agreement required

to be performed by them. Likewise, the evidence shows that they likewise performed the requirements of the memorandum agreement. However, even if they had not, the latter is a wholly separate and independent contract, and any breach thereof cannot affect appellees' rights under the purchase agreement which is the basis of this action.

Nor are appellants entitled to an offset for any expenses they might have incurred in keeping the sheep, for on this point there is a complete failure of pleading and proof.

Appellees submit that the judgment of the District Court should be affirmed.

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By _____

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